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ABSTRACT

This paper--part of a collection of 54 papers from the 48th annual conference of the Education Law Association held in November 2002--discusses open-meeting laws. All 50 states have adopted laws that require school officials to conduct their business in open sessions before the public and the press. This paper examines the Brown Act, California's open-meeting law, as an example of how state legislatures have struck the balance between the public's access to local legislative bodies on the one hand and the need for confidential candor, debate, and problem-solving on the other. It also presents 24 questions, in the form of a true-false quiz, designed to clarify critical concepts. The paper concludes with five key questions to assist planners in complying with meeting laws in any state: (1) What constitutes a meeting? (2) How must the public be notified of the meeting and the business to be transacted? (3) What are the restrictions on the board as it conducts business? (4) What are the limits on the public's right to participate? and (5) What are the state and federal statutes that affect the government process, and what policies and procedures need to be in place? (WFA)

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Balancing the Rights and Responsibilities of the School Board and the Public's Right to Know: California's Open Meeting Law.

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November 2002

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California's Open Meeting Law

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BALANCING THE RIGHTS AND RESPONSIBILITIES OF THE SCHOOL BOARD AND THE PUBLIC'S RIGHT TO KNOW: CALIFORNIA'S OPEN MEETING LAW

OPEN MEETING LAWS

All fifty states have adopted some form of public meeting laws which require local school officials to conduct their business in open sessions in front of the press and the public except in very limited circumstances. These laws create an obvious tension between board members, who must become experts in the fine nuances of the law, and members of the public, who might prefer to have all public business conducted in public session.

California's Brown Act (California Government Code section 54950 et seq.) is but one example of how state legislatures have struck the balance between public access to local legislative bodies on the one hand and the need for confidential candor, debate and problem-solving on the other.

THE GENERAL RULE

The general rule is that all meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency. [California Government Code section 54953.] Legislative bodies include school district governing boards and subordinate commissions, committees, boards, whether permanent or temporary, decision-making or advisory, created by resolution or some other formal action of a legislative body. [California Government Code section 5492(b).]

Many states, including California, exclude advisory committees composed solely of members of the legislative body which are less than a quorum of the legislative body as long as such committees are not standing committees. [California Government Code section 54952(b).]

WHAT IS A MEETING?

Generally, an actual meeting is required before the open meeting requirements are triggered. A "meeting" is a gathering of a quorum of the legislative body, no matter how informal, where business is discussed or transacted. The term "meeting" has been interpreted to include "study," "discussion," "informational," "fact-finding," or "pre-meeting" gatherings of a quorum of the members of a board whether or not action is taken. In California a "meeting" occurs whenever there is a congregation of a majority of the members of the legislative body at the same time and place to hear, discuss or deliberate upon any topic that is within the subject matter jurisdiction of the body. [California Government

Code section 54952.2(a).] California specifically considers the use of direct communication, personal intermediaries, or technological devices in determining whether there has been a "meeting." [California Government Code section 54952.2(b).] There are also special provisions for teleconference meetings whether by audio or video means. [California Government Code section 54953(b).] The provisions require, however, that such meetings must be conducted in a manner that protects the statutory and constitutional rights of the parties and the public.

Recognizing that elected officials often attend strictly ceremonial events or public gatherings where issues of community interest are discussed, most states, including California, statutorily exclude attendance of a majority of the members of a board at such events provided that a majority of the members do not discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the legislative body. [California Government Code section 54952.2.]

MEETING PROCEDURES

Most states require that local agencies hold regularly scheduled meetings. For instance, California generally requires monthly meetings. Absent a statutory exception, those meetings must be held within the boundaries of the agency. [California Government Code section 54954.] The local agency must post timely notice of its meetings and provide copies of the written agenda and related documents to requesting members of the public. The agendas must reasonably apprize the public of the matters to be considered in sufficient detail to allow the public whether to participate at the meeting.

While California, like many other states, requires public agencies to provide an opportunity on each agenda item for members of the public to address the local agency, it also has very specific limits on what members of the legislative body may say in response to such public comment. Since the topics of such comments may not have prepared on the body's agenda, members may only respond briefly, ask clarifying questions, request that staff report back or direct that the matter be placed on a future agenda. [California Government Code section 54954.2(a).] Further, California *Brown Act* specifically provides that local agencies may not prohibit public criticism during its meetings. [California Government Code section 54954.3(c).]

One of the thornier debates related to public meeting agendas relates to public dissemination of materials distributed to members of the legislative body during meetings. Most, if not all, states require that such documents be made available to the public absent a specific statutory exemption. [See California Government Code section 54954.3.]

When action is taken during a public session, such action must not be by secret ballot. Such action would, of course, preclude attending visitors from determining the position of any given legislative member on a specific issue.

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CLOSED SESSIONS

While the general rule is that all meetings of the governing boards of local agencies must be held in public, all state legislatures have provided limited exceptions under which the legislative bodies may properly meet in closed session. Because such sessions are the exception to the rule, they are very narrowly interpreted by the courts. California's statutory scheme allows closed sessions, for example, to consider appointment, employment, evaluation of performance, and discipline or dismissal of an employee. Elected officials are specifically excluded, however, from the definition of employee. California local agencies may also meet in closed session to consider charges against employees. Further provision is made for closed session to discuss pending or threatened litigation, student discipline, collective bargaining, real property transactions, and tort claims. [California Government Code sections 54956.8, 54956.9, 54956.95 and California Education Code sections 35146 and 72122.]

ENFORCING PUBLIC MEETING LAWS

California's *Brown Act* contains criminal penalties applicable to any member of a board who attends a meeting where action is taken in violation of any provision of the Act and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled to under the Act. There is an exception for good faith reliance on advice of legal counsel. [California Government Code section 54959.] Aside from criminal liability, civil remedies may include a requirement that future closed sessions be taped and/or voiding the illegal action. Prior to filing an action for violation of the Act, a complainant must make a demand that the local agency cure the alleged violation.

AUDITING THE PUBLIC MEETING PROCESS

The principle of governance through elected representatives is a key dimension to a true democracy. Our public schools must continue to practice effective governance by balancing the responsibilities of the boards and the rights of the constituents. The business of the board must be done in public and be open to public scrutiny.

Although this presentation has provided a brief preview of the laws in California, the following portion is an exercise to test the audience's perceptions. Both school board members and administrators need to know the laws which guide them as they conduct the people's business. Each of the 24 items in this legal audit is designed to challenge the individual and to clarify selected critical concepts.

QUESTIONS FOR
A PUBLIC MEETING ACT AUDIT

	QUESTION	T	F
1.	The Brown Act only applies to the governing body of a school or community college district and not to the committees or commission the governing body establishes. (Gov. Code § 54951)		
2.	Any member of the board may place matters on the board agenda directly related to school district business. (Ed. Code § 35145.5)		
3.	An ad hoc committee consisting of three members of a five-member board established to select a new superintendent is not subject to the Brown Act. (Gov. Code §§ 54952(b) and 54952.2(a))		
4.	Standing committees composed solely of less than a quorum of the members of the governing board are subject to the Brown Act. (Gov. Code § 54952(b))		
5.	A superintendent's cabinet which is established by the superintendent without formal action by the governing board is not subject to the Brown Act. (Gov. Code § 54952(b))		
6.	All five members of the board go together to see Evita. This "meeting" is subject to the Brown Act. (Gov. Code § 54952.2(a))		
7.	On a five-member board, board member X calls member Y who in turn calls member Z for the purpose of sharing their views on a matter on the board's upcoming meeting agenda. A meeting under the Brown Act has occurred. (Gov. Code § 54952.2(b))		
8.	The superintendent can informally poll members of the governing board to determine their position on a particular issue within the board's jurisdiction.		
9.	It is <u>not</u> a meeting under the Brown Act for a majority of the Board to attend a community forum on a statewide bond measure affecting education. (Gov. Code § 54952.2(c))		
10.	For an action to be taken under the Brown Act, there must be a formal vote by the members of the governing board. (Gov. Code § 54952.6)		
11.	Board members can meet through video teleconferencing or telephone conference call. (Gov. Code § 54953)		

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	QUESTION	T	F
12.	The public has a right to videotape or tape record the open session of a board meeting. (Gov. Code § 54953.5)		
13.	The Board may schedule a retreat at a location outside the boundaries of the District so long as no action is taken at the meeting. (Gov. Code § 54954)		
14.	The governing board is required to establish a time and place for holding its regular meetings by resolution, rule or other official action. (Gov. Code § 54954(a))		
15.	No action or discussion may be undertaken on any item not listed on the agenda except to respond to members of the public addressing the board at the meeting. (Gov. Code § 54954.2(a))		
16.	The agenda must be posted at least 72 hours before the meeting and may not be changed after posting. (Gov. Code § 54954.2(b))		
17.	The agenda must provide for members of the public to have an opportunity to address the board before or during the board's consideration of the item. (Gov. Code § 54954.3(a))		
18.	The governing board can prohibit public criticism of school district personnel and require that such criticism be done in closed session. (Gov. Code § 54954.3(c))		
19.	An agenda item such as "Personnel" would allow consideration of an action to approve the evaluation of the superintendent. (Gov. Code § 54954.5)		
20.	In considering employee discipline, the closed session agenda must identify the name or position of the employee. (Gov. Code § 54954.5(e))		
21.	All votes taken in closed session must be reported in open session. (Gov. Code § 54957.1)		
22.	Where an action in closed session must be reported, the vote or abstention of each member must be stated. (Gov. Code § 54957.1(a))		
23.	The governing board may begin its meetings in closed session.		
24.	The superintendent's "Weekly Update" is not subject to disclosure under the Public Records Act because it contains personnel information. (Gov. Code § 54957.5)		

ANSWERS TO
A PUBLIC MEETING ACT AUDIT

1. *False*. Under Government Code section 54951, a public agency is defined to include any board, commission, or agency that is a part of a "local agency" that is subject to the Brown Act.

2. *True*. Members of the public are entitled to place items on the agenda of school board meetings. Districts can adopt reasonable rules and regulations to establish a process for placing items on the agenda. (Ed. Code § 35145.5)

3. *False*. Any meeting of the majority of the members of the legislative body is subject to the Brown Act. (Gov. Code §§ 54952(b) and 54952.2(a))

4. *True*. Under recent Brown Act amendments, standing committees of the legislative body having a continuing subject matter jurisdiction or a meeting schedule set by charter, ordinance, resolution for formal action of the legislative body are legislative bodies under the Brown Act. (Gov. Code § 54952(b))

5. *True*. Advisory bodies established without formal action of the governing board are not subject to the Brown Act. (See Gov. Code § 54952(b))

6. *False*. The attendance of the majority of the members of the governing board at a purely social event is not a meeting under the Brown Act provided they do not discuss among themselves business within the subject matter jurisdiction of the district.

7 *True*. The use of personal intermediaries by a majority of the board to develop a collective concurrence on an item is prohibited by the Brown Act. (See Gov. Code § 54952.2(b))

8. *False*. See answer to #10 above. However, it could be argued that merely polling members of the board is not communicating to them for the purpose of obtaining "collective concurrence."

9. *True*. Attendance of the majority of the board at open and publicized meetings organized to discuss topics of local community concern does not constitute a meeting under the Brown Act provided the board members do not discuss among themselves items of a specific nature that are within the subject matter jurisdiction of the District. (See Gov. Code § 54952.2(c))

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10. *False*. Any collective commitment or promise by a majority of the members of the board to make a positive or negative decision is an action taken under the Brown Act. (See Gov. Code § 54952.6(c))

11. *True*. Government Code section 54953(b) permits teleconferencing, not just "video teleconferencing," for all purposes in connection with any meeting within the subject matter jurisdiction of the legislative body.

(a) Teleconference means a meeting of individuals in different locations, connected by electronic means, through either audio or video, or both.

(b) Teleconference meetings must comply with all requirements of the Brown Act and all other applicable provisions of law relating to the specific type of meeting or proceeding.

(c) All votes taken during a teleconferenced meeting shall be by rollcall.

(d) Agendas must be posted at each teleconference location, agendas must identify each Teleconference location, and each location must be accessible to the public. The agenda must provide an opportunity for the public to address the legislative body directly at each teleconferencing location.

(e) During the telconference, at least a quorum of the members of the legislative body shall participate from locations within the boundaries of the territory over which the local agency exercises jurisdiction.

(f) Teleconferenced meeting must be conducted in a "manner that protects the statutory and constitutional rights of the parties or the public." (See Gov. Code §54953(b)(3).)

12. *True*. The public's right to audio or video tape record a meeting can be overridden by the board if it makes a reasonable finding that the recording constitutes a persistent disruption of the meeting. (See Gov. Code § 54953.5(a))

13. *False*. The board may meet outside of the boundaries of the District for only limited reasons as set forth in Government Code section 54954. Governing boards of community college districts are subject to even stricter limitation. (See Ed. Code § 72000(d))

14. *True*. (See Gov. Code § 54954(a)) The board many cancel a regularly held meeting in advance or adjourn a regular meeting to a time and place specified in the order of adjournment. (Gov. Code § 54955) Less than a quorum of the board may adjourn the meeting.

15. *True.* The Brown Act not only limits the board from taking action on items not listed on the agenda but also prohibits discussion of nonagenda subjects. Governing boards should exercise caution in how agenda items are worded. Defining an item in too narrow a fashion can restrict discussion of the item. However, a broad, all encompassing agenda item (e.g. Discussion of District goals and objectives) probably violates the Act.

16. *False.* Section 54954.2 allows for changing the agenda under certain circumstances. For example, the agenda can be modified by a 2/3 vote of the legislative body where it is established that there is a need to take immediate action and the need for action came to the attention of the local agency subsequent to the agenda being posted. (See Gov. Code § 54954.2(b))

17. *True.* Regular meeting agendas are required to provide an opportunity for members of the public to address the legislative body on any items of interest to the body both before and during the legislative body's consideration of the item. The agenda should also include a provision authorizing members to directly address the legislative body concerning any item of interest to the public. (See Gov. Code § 54954.3(a))

18. *False.* Under *Baca v. Moreno Valley Unified School District*, it now appears that governing boards are prohibited by the First Amendment from limiting public criticism of school officials.

19. *Probably False.* Such a listing would probably be held to be inadequate to describe the matters to be discussed in closed session, particularly in view of the "safe harbor" language specified in section 54954.5.

20. *False.* The "safe harbor" agenda language for employee discipline only requires the statement "PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE." No additional identifying language is required.

21. *False.* The actions which must be reported at the conclusion of closed session are those set forth in section 54957.1. There is no report required for some actions, e.g. completion of the evaluation of an employee, direction to legal counsel regarding items in litigation, etc.

22. *True.* A statement of how each member voted must be included in the report in open session. (See Gov. Code § 54957.1(a))

23. *False.* Prior to holding a closed session, the board must meet in open session and disclose any item or items to be discussed in the closed session. Disclosure may simply identify by reference the items listed by number or letter in the agenda. With regard to anticipated litigation, the facts or circumstances justifying the closed session must be publicly stated if not set forth in the agenda. This requirement does not apply if facts or circumstances are not known to the other potential parties to the litigation.

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24. *Probably False*. The PRA would appear to require disclosure of such weekly bulletins although personnel information should be redacted.

CONCLUSION

In summary, representatives from our fifty states will find many common issues with the information that has been presented, and many will also find differences in the law in their jurisdictions; however, it is imperative that administrators, boards, and the public know the law, policies, and procedures that guide the deliberations and decision-making of their school boards.

The five concluding questions are designed to assist in complying with the public meeting law in any state.

1. What constitutes a meeting ?
2. How must the public be notified of the meeting and the business to be transacted?
3. What are the restrictions on the board as it conducts business?
4. What are the limits on the public's right to participate?
5. What are the state and federal statutes which affect the governance process and what policies and procedures need to be in place?

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